MOTION FILED

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No. 08-1089

IN THE

Supreme Court of the United States

JACOB WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF AND BRIEF OF THE AMERICAN OCCUPATIONAL THERAPY ASSOCIATION, INC., THE AUTISTIC SELF ADVOCACY NETWORK, CHILDREN'S LAW CENTER OF THE UNIVERSITY OF RICHMOND SCHOOL OF LAW, DISABILITY LAW & ADVOCACY CENTER OF TENNESSEE, EASTER SEALS OF NORTHERN OHIO, INC., E-ACCOUNTABILITY FOUNDATION D/B/A PARENTADVOCATES.ORG, AND PARENTS FOR AUTISTIC CHILDREN'S EDUCATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF

Amici Curiae, The American Occupational Therapy Association, Inc., The Autistic Self Advocacy Network, Children's Law Center of the University of Richmond School of Law, Disability Law & Advocacy Center of Tennessee, Easter Seals of Northern Ohio, Inc., E-Accountability Foundation d/b/a Parentadvocates.org, and Parents for Autistic Children's Education (collectively, "*Amici*"), move this Honorable Court for leave to file their Brief in Support of Petitioners out-of-time, as follows:

1. Rule 37 of the Rules of the Supreme Court of the United States provide that: "An *amicus curiae* brief in support of a petitioner . . . shall be filed within 30

days after the case is placed on the docket or a response is called for by the Court, whichever is later[.]"

2. Here, Respondent obtained an extension of time within which to file its brief, until May 29, 2009.

3. Counsel for *Amici* mistakenly interpreted the above Rule to permit filing of *Amici*'s Brief by May 29, 2009.

4. Respondent was aware that *Amici* intended to file a brief in support of Petitioners and, indeed, filed a letter consenting to such filing on April 30, 2009.

5. *Amici* filed their brief on May 29, 2009.

6. None of the parties would suffer any prejudice due to this late filing.

Accordingly, *Amici* request that the Court grant leave for *Amici* to file their Brief in Support of Petitioners out-of-time, which is attached hereto.

Respectfully submitted,

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June 10, 2009

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INTEREST OF THE AMICI CURIAE[1]

Founded in 1917, the American Occupational Therapy Association (AOTA) represents the professional interests and concerns of more than 140,000 occupational therapists, assistants and students nationwide. AOTA educates the public and advances the profession of occupational therapy by providing resources, setting standards, including accreditations, and serving as an advocate to improve health care. Based in Bethesda, Maryland, AOTA's major programs and activities are directed toward promoting the professional development of its members and assuring consumer access to quality services so that patients can maximize their individual potential.

The Autistic Self Advocacy Network (ASAN) is the leading non-profit advocacy organization run by and for autistic people. ASAN's supporters include autistic adults and youth, people with other disabilities and neurotypical family members, professionals, educators and friends. ASAN was created to provide support and services to individuals on the autism spectrum while working to change public perception and combat misinformation by educating communities about persons on the autism spectrum. ASAN's activities include public policy advocacy, community engagement to encourage inclusion and respect for neurodiversity, quality of

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* and their members made a financial contribution towards the preparation and submission of the brief. Letters reflecting the consent of the parties have been lodged with the Court.

life oriented research and the development of autistic cultural activities and other opportunities for autistic people to engage with others on the spectrum.

The Children's Law Center of the University of Richmond School of Law (CLC-UR) serves as the umbrella organization for the University of Richmond Law School's long established clinical programs. These clinics have represented children, at no cost, in juvenile court and special education proceedings since 1979. In order to best serve the interests of the children they are representing, the clinics recognize that the practice of children's law requires knowledge of the intersection of many disciplines including psychology, education, social work, and child development. The CLC-UR regularly represents clients with disabilities in various stages of special education proceedings in an effort to ensure that these children receive a free appropriate public education (FAPE) under the IDEA. The CLC-UR works to protect the rights of both children with disabilities and their parents as guaranteed under the IDEA.

Disability Law & Advocacy Center of Tennessee (DLAC) is a federally funded and authorized Protection and Advocacy organization that has provided advocacy services to people with disabilities in Tennessee since 1978. DLAC advocates for the educational rights of students and their parents under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA), through legal representation and (or through) training for individuals and groups and by providing support in individualized education program (IEP) development. DLAC also serves as a resource for private attorneys, government officials and school personnel.

Easter Seals, founded in 1919, is the nation's oldest and largest nonprofit organization serving both children and adults with disabilities or other special needs. Easter Seals' mission is to provide exceptional services to ensure that all people with disabilities or special needs and their families have equal opportunities to live, learn, work and play in their communities. In September 2007, Easter Seals Northeast Ohio merged with Easter Seals Northwestern Ohio to become Easter Seals of Northern Ohio, Inc.

E-Accountability Foundation, d/b/a Parentadvocates.org, is a Section 501(c)(3) non-profit organization dedicated to informing parents and children of their legal rights and assisting in the processes required to obtain an appropriate educational program for every child.

Parents for Autistic Children's Education (PACE) is a non-profit membership organization that serves parents and guardians of children with autism or similar disorders in the Northern Virginia area. PACE advocates on behalf of children with autism and their families for high-quality, effective and scientifically based educational programs and to ensure school-system compliance with the IDEA.

The Court's decision in this case will have profound effects on whether children receive a FAPE under the IDEA. *Amici* regularly represent and/or advocate for the interests of children and parents in the ongoing pursuit of a FAPE. *Amici* have a significant interest in participating in this debate and wish to offer their unique perspective on the reasons why the Court should grant the petition.

STATEMENT OF RELEVANT FACTS

Since 2001, when Jacob Winkelman, a child with autism, began attending the Achievement Center for Children-East (the "Achievement Center"), Respondent Parma City School District (the "School District") and Jacob's parents (the "Winkelman Parents") agreed that Jacob needed occupational therapy and, therefore, included the provision of that service in his written IEP. JA 303.[2] Accordingly, in 2003, during the several months-long process to develop Jacob's IEP for the 2003-04 school year (the "2003 IEP"), the School District conducted an assessment of Jacob's needs for occupational therapy. JA 304. Maria Llerena, an occupational therapist, provided a Final Summary of her assessment (dated May 6, 2003), in which she "highly recommended" that Jacob continue to receive occupational therapy services. JA 350. Jacob's teacher at the Achievement Center noted that occupational therapy had been working for Jacob and that, at the end of the 2002-03 school year, Jacob was making great progress toward reaching some of his goals. JA 186. Jacob, however, was only at the beginning stages of developing those skills – in other words, he needed additional occupational therapy to develop them fully. *See id.*

In May 2003, after the assessment of Jacob's needs was completed, the School District met with the Winkelman Parents to discuss those results (as well as Jacob's other needs). In this regard, in a Team Summary and Interpretation of the Multifactored Evaluation that the School District

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[2] Citations to "JA" refer to the Joint Appendix filed with the United States Court of Appeals for the Sixth Circuit.

prepared and signed, the School District noted that Jacob continued to need occupational therapy. *See* JA 11-12; *see also* JA 103-04. That same day, the Winkelman Parents and the School District met to discuss the services that the School District would provide Jacob during the summer of 2003. JA 469-75. Again, the School District agreed that because of Jacob's need for continued occupational therapy, this service would have to be provided for Jacob through the summer at the Achievement Center. *See* JA 473.

Then, in June 2003, the Winkelman Parents met with the School District to review the written IEP that the School District had prepared for the upcoming school year. Instead of using the assessment recently conducted or IEPs from prior years as a basis for working with the Winkelman Parents to create the 2003 IEP, the School District presented the Winkelman Parents with a written IEP that did not contain many of the fundamental services that Jacob needed and had been receiving under the prior IEPs to which the School District had agreed. JA 305-09. Relevant to the pending matter, under the 2003 IEP, there was no commitment to continue to provide any occupational therapy; the written 2003 IEP stated only: "OT-Sensory (as part of FBA) assessment to be completed by Sept. 30, 2003." JA 115.

With no ability to force the School District to provide the very services, including occupational therapy, that the School District itself had agreed were necessary only one month earlier, the Winkelman Parents decided to place Jacob at a private school, the Monarch School for Children with Autism. JA 311. They subsequently initiated the pending lawsuit.

REASONS FOR GRANTING THE PETITION

The IDEA was designed to ensure that all children with disabilities have access to a FAPE. 20 U.S.C. § 1400(d)(1)(A). Among other provisions enacted by Congress to guaranty that a FAPE is provided, school districts are required to develop a written IEP that is unique to the needs of each child. *Id.* § 1414(d). That written IEP, developed through a process that mandates input from parents, must specify, among other things, the "related services" – defined as "supportive services . . . as may be required to assist a child with a disability to benefit from special education" – that will be provided to the child. *See id.* § 1401(26)(A). Indeed, in lawsuits such as the pending one, courts must evaluate whether the written IEP, including the related services specified therein, "developed through the [IDEA's] procedures [is] reasonably calculated to enable the child to receive educational benefits." *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) (citation omitted).[3] Such a review cannot fairly be accomplished where, as here, the school district is permitted to assert, months after the thorough process of developing the written IEP with the

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[3] In *Rowley*, this Court construed the Education of the Handicapped Act (EHA), the predecessor to the IDEA. *See, e.g.*, S. Rep. No. 107-11, at 22; H.R. Rep. 106-1040, at 66; *see also* H.R. Rep. 105-95, at 81 ("The EHA amendments of 1990, Public Law 101-476, renamed the statute as the Individuals with Disabilities Education Act"). This Court and other federal courts routinely rely interchangeably on cases that cite the IDEA and cases that cite the EHA. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 51 (2005); *Diatta v. D.C.*, 319 F. Supp. 2d 57, 62 (D.D.C. 2004).

parents' involvement, that it intended to provide the child with "related serves" not specified in the IEP.

The United States Court of Appeals for the Sixth Circuit's ruling in this case, however, effectively ignores Congress' express mandate that the written IEP specify the "related services" (and information about those services) that the child will receive. *Winkelman v. Parma City Sch. Dist.*, No. 05-3886 (6th Cir. Oct. 2, 2008) (unreported), *affirming by adopting*, 411 F. Supp. 2d 722 (N.D. Ohio 2005). The Sixth Circuit's ruling, along with decisions by the First and Seventh Circuits, conflicts with the decisions of the Fourth, Ninth and Tenth Circuits, which confine a court's analysis of the content of the IEP to the four corners of the document. This Court should grant the petition to resolve the conflict among the circuits in favor of the Fourth, Ninth and Tenth Circuits.

I. There is a Conflict Among the Circuits Concerning Whether Courts May Look Outside the Four Corners of the Written IEP in Analyzing Its Content.

There is a split among the courts of appeals concerning whether courts may look beyond the four corners of the written IEP to determine whether the content of the IEP provides a FAPE: three circuits limit the review to only the four corners of the written IEP; and three circuits (including the Sixth Circuit in this case) have condoned reliance on extrinsic evidence in analyzing the content of the IEP.

Three courts of appeals have held that, when analyzing the content of an IEP, courts should consider only the written IEP. *See, e.g., Sytsema v.*

Academy Sch. Dist., 538 F.3d 1306, 1315 (10th Cir. 2008) (remanding to district court to determine whether the IEP provided a FAPE, but providing instruction that, on remand, district court should consider only the written IEP and not offers made by school district subsequent to creation of the IEP); *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681-82 (4th Cir. 2007) (in holding that the IEP, which did not identify name of school where the child would be placed, did not comply with the IDEA, Fourth Circuit ruled that "[i]n evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself"); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1525-26 (9th Cir. 1994) (holding that school district's failure to identify in the IEP the name of the school, despite parents' knowledge of that school, violated a "formal requirement" under the IDEA); *see also Cty. Sch. Bd. of Henrico Cty. v. Z.P.*, 399 F.3d 298, 306 n.5 (4th Cir. 2005) (in disagreeing with school district's argument that hearing officer should have considered that the child would be given a one-on-one aide, even though not listed in the IEP, Fourth Circuit noted that "the hearing officer properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP").

Three courts of appeals have taken the dramatically different approach of permitting courts to consider matters outside the four corners of the IEP in analyzing the content of the IEP. According to the Northern District of Ohio's ruling in this case, which was adopted by the Sixth Circuit, "the lack of goals and objectives for occupational therapy only constitutes a procedural technical violation of the IDEA and not reversible error." *Winkelman*, 411 F.

Supp. 2d at 731. In so ruling, the Northern District relied on and summarized the holding of a prior Sixth Circuit case, *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990): "the [Sixth Circuit] held that an IEP that did not include present educational performance levels and objective criteria for determining whether instructional goals were being met constituted a mere technical violation of the IDEA. . . . [T]o say that such technical violations render an IEP invalid 'is to exalt form over substance.'" *Winkelman*, 411 F. Supp. 2d at 730-31 (*citing Defendant I*, 898 F.2d at 1189-90).[4] Two other courts of appeals – the First and Seventh Circuits – similarly have condoned looking beyond the four corners of the IEP. *See John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202*, 502 F.3d 708, 715 (7th Cir. 2007) (although acknowledging that "[u]nder usual circumstances, the [district court on remand] should find it unnecessary to go beyond the four corners of the [IEP] in order to [evaluate the IEP]," court stated that "vagueness in the instrument with respect to how its goals are to be achieved may require that the court turn to extrinsic evidence to determine the intent of those who formulated the plan"); *C.G. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) (stating that where the IEP is not in its final version, district court may look to extrinsic evidence to determine whether the IEP

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[4] For a period of time after *Defendant I* but prior to its ruling below, the Sixth Circuit took the position that courts should limit their evaluation of the IEP to the terms of the document itself, as presented in writing to the parents. *See, e.g., Cleveland Heights v. Boss*, 144 F.3d 391, 398 (6th Cir. 1998); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768-70 (6th Cir. 2001).

provides the requisite "educational benefit"). For the reasons discussed below, these rulings are incorrect.

Given the lack of uniformity in the treatment of this issue, *amici* respectfully submit that the Court should grant the Petition in order to resolve the question of whether courts may look beyond the four corners of the IEP in analyzing the content of the IEP to determine whether it provides a FAPE.

II. The Decision Below Undermines A Basic Tenet of the IDEA – the Partnership Between School Districts and Parents.

As this Court has recognized, "it is the natural duty of the parent to give his children education suitable to their station in life." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). In this regard, and as Congress recognized, parental participation under the IDEA is critical to the development of an appropriate education plan for a child with a disability. *See Rowley*, 458 U.S. at 208 ("Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, and in the formulation of the child's individual educational program.") (citations omitted). Indeed, the IDEA provides for extensive cooperation between parents and the school district in the IEP process. *See generally* 20 U.S.C. § 1414. As the Court explained in *Schaffer*, 546 U.S. at 53, parents play a significant role in the IEP process, including being members of the IEP team, having the right to examine records relating to their child, being entitled to notice prior to any changes to the IEP and being notified of the procedural safeguards available to them under the IDEA.

Specifically, the school district, after an evaluation of the child's academic, developmental and functional needs, is to offer a proposed IEP to the parents. *See generally* 20 U.S.C. §§ 1414-15. Parents, in turn, are to review the proposed IEP, and work with the school district to revise it as appropriate to address the child's continued needs. *See id.* The end result is a written document, jointly developed and agreed upon by the school district and parents, that clearly sets forth the necessary information required under the IDEA. *See id.* § 1414(d)(1)(A); *see also Sytsema*, 538 F.3d at 1312 ("State school officials develop each IEP through a collaborative process [with parents] that is a central characteristic of the IDEA framework."). In other words, the written IEP is analogous to a "contract" between the parents and school district to provide an appropriate education to the child. Relevant to the pending matter, then, the written IEP must contain, with contract-like specificity, a statement of the "related services" to be provided to the child. *See id.* § 1414(d)(1)(A)(4).

Accordingly, when analyzing the content of an IEP in reviewing whether it provides a FAPE, courts must be limited to the four corners of the written IEP; otherwise, the review undercuts the partnership between parents and the school district that Congress envisioned when developing the procedural safeguards within the IDEA. *See, e.g.*, *Rowley*, 458 U.S. at 201 (noting that Congress, seeking to ensure parental involvement, adopted procedural mechanisms to encourage school districts and parents, working together with experts, to develop jointly a written IEP that grants "access to specialized instruction and related services which are

individually designed to provide educational benefit" to each child). With this is mind, the IDEA precludes school officials from making unilateral decisions about a child's IEP. *See* 34 C.F.R. Part 300, Appendix A, "Interpretation of IEP and Other Selected Requirements under Part B of the [IDEA]," Question 9 (Department of Education explaining that parents and school personnel are "equal participants" and "equal partners" in making decisions about the content of a child's written IEP). Similarly, it would be patently unfair for the school district to omit required content from the written IEP, which parents jointly develop and approve, but later, in the midst of a hearing/lawsuit regarding whether the written IEP provides a FAPE, to assert that it *intended* to supplement the written IEP. *See* Petition for Writ of Cert., at 20-23 (discussing obstacles in reviewing appropriateness of an IEP if information is not included in the written IEP). For example, here, the Winkelman Parents were presented with an IEP that guaranteed no occupational therapy, notwithstanding the previous, consistent documentation of Jacob's need for such services. Rather, the Winkelman Parents were promised nothing more than one more assessment of Jacob's OT-sensory needs – to be completed by September 30, 2003.[5] In this

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[5] In this regard, the School District's actions also violated 20 U.S.C. § 1414(d)(2)(A), which provides that:

> *At the beginning of each school year*, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(Emphasis added).

circumstance, the Winkelman Parents had virtually no choice but to remove Jacob from the public school district and to place him in the private school.

III. The Fourth, Ninth and Tenth Circuits Correctly Ruled that Courts Must Limit Their Review to the Written IEP.

When Congress reauthorized the IDEA in 2004, Senator Harkin reiterated the necessity of the written IEP, noting that it serves as a "critical protection[] for parents and children to transform the constitutional requirement into a practical reality throughout the country." 150 Cong. Rec. S5326 (daily ed. May 12, 2004). Senator Harkin observed that "[g]etting that plan in place in the first place, rather than after any problems occur, is critical to making [the IDEA] work for everyone." 150 Cong. Rec. S5327 (daily ed. May 12, 2004). If school districts are not required to specify in the written IEP the "related services and other components required by the IDEA, then parents (and, in turn, their children with disabilities) will be stripped of the very protection that Congress intended. *See Sytsema*, 538 F.3d at 1316 ("[G]iven our own hesitancy to analyze the substantive deficiencies of an oral offer, we are reluctant to require parents to make a similar judgment regarding a proposed IEP without a final written offer."); *see also Smith*, 15 F.3d at 1526 ("The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later . . . . Furthermore, a formal, specific offer from a school district will greatly assist parents in 'presenting complaints with respect to any matter relating to the . . . educational placement of the child.'") (citation omitted).

Under the IDEA, an IEP is defined as a written statement for each child with a disability, which includes "a statement of the special education and related services . . . to be provided to the child[.]" 20 U.S.C. § 1414(d)(1)(A)(i)(IV). As the Tenth Circuit pointed out in *Sytsema*, this statutory definition of an IEP must be read in light of the Supreme Court's mandate that "federal courts must determine whether a school district substantively complied with the Act by focusing on whether 'the [IEP] developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits[.]'" *Sytsema*, 538 F.3d at 1315 (*quoting Rowley*, 458 U.S. at 207). If, as the Sixth Circuit permitted here, school districts may circumvent parental involvement in developing the IEP by failing to specify what "related services" will be provided to a child, then under the plain language of the IDEA, the IEP will not be "reasonably calculated" to provide a FAPE. *See also* 20 U.S.C. § 1400(d)(1)(A) (Congress stating that one of the purposes behind the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that *emphasizes special education and related services* designed to meet their unique needs and prepare them for further education, employment, and independent living") (emphasis added).

IV. The Issue Presented by this Case Potentially Affects Whether Millions of Children Will Receive an Appropriate Education.

With respect to the education of a child with disabilities, Congress recognized the vital role of related services in general – and occupational therapy in particular. Congress and the courts also have recognized the importance of providing needed services without delay. Allowing a school district to postpone decision-making – as attempted by the School District here – undermines the IDEA and harms the children the law was designed to serve.

As previously indicated, the IDEA requires an IEP to include a statement of the "related services" to be provided to the child. 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *see also id.* § 1401(14). "Related services," in turn, are defined as "supportive services . . . as may be required to assist a child with a disability to benefit from special education[.]" *Id.* § 1401(26)(A). These services are not simply an afterthought; they are central to the purpose of the IDEA. As the Third Circuit noted, related services serve as "important facilitators of classroom learning" for children with disabilities. *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 176 (3d Cir. 1988). Indeed, "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists[.]'" *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 893 (1984) (citation omitted).

Occupational therapy is specifically included among the "related services" recognized by Congress (20 U.S.C. § 1401(26)(A)) – and with good reason. Historically, approximately 70% of schools in the

United States use some form of occupational therapy for students with disabilities, rendering occupational therapy the second most used related service for children with disabilities. U.S. Dep't of Educ., Twenty-Fifth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act 52 (2003), *available at* http://www.ed.gov/about/reports/annual/osep/2003/index.html (last visited May 18, 2009).

Occupational therapy as practiced today extends far beyond the employment or vocational context. Indeed, occupational therapy is defined as:

> [T]he therapeutic use of everyday life activities (occupations) with individuals or groups for the purpose of participation in roles and situations in home, school, workplace, community, and other settings. . . . Occupational therapy addresses the *physical, cognitive, psychosocial, sensory, and other aspects of performance in a variety of contexts* to support engagement in everyday life activities that affect health, well-being, and quality of life.

The American Occupational Therapy Association, *Association Policies*, Am. J. Occupational Therapy 694 (2004) (emphasis added); *see also* Psychiatric Bulletin, *Why Occupational Therapy?* (1992), http://pb.rcpsych.org/cgi/reprint/16/7/406.pdf ("Occupational therapy may be defined as the treatment of physical and psychiatric conditions through specific activities to help people reach their maximum level of function and independence in daily life.").

Given the wide array of needs addressed by occupational therapy, it is often vital that children with disabilities receive such services, as numerous experts have recognized:

- Occupational therapy is aimed at enhancing a child's sensory processing, sensorimotor performance, social-behavioral performance, self-care and participation in play. Case-Smith, J. & Arbesman, M., *Evidence-Based Review of Interventions for Autism Used in or of Relevance to Occupational Therapy*, 62 Am. J. Occupational Therapy 417 (2008);
- "Occupational therapy can provide intervention that helps children to develop appropriate social, play, and learning skills." The therapist "aids the child in achieving and maintaining normal daily tasks such as getting dressed and playing with other children." American Occupational Therapy Association, Inc., *Understanding Autism*, May 16, 2007, http://www.aota.org/Consumers/Tips/Conditions/Autism/3515.
- An occupational therapist "seek[s] to determine what factors affect the child's ability to meet the demands of his or her occupations [*i.e.*, activities] and fully participate in them." Stephanie Yamkovenko, *OT's Role in Children's Mental Health Awareness Day*, May 5, 2009, http://www.aota.org/News/Announcements/MH-Awareness.aspx.

For children with autism, such as Jacob Winkelman, occupational therapy provides invaluable assistance in attempting to lead a normal life. *See* The American Occupational Therapy Association, Inc., *Understanding Autism*, May 16, 2007, http://www.aota.org/Consumers/Tips/Conditions/Autism/35155. Indeed, "[t]he importance of occupational therapy services for children with autism has been supported by professionals in the fields of medicine, psychology, special education, and occupational therapy." Watling, R., *et al.*, *Current Practice of Occupational Therapy for Children with Autism*, The American Journal of Occupational Therapy, Sept. 1999 (Vol. 53, No. 5) at 498-99 (citations omitted); *see also* The American Occupational Therapy Association, Inc., Occupational Therapy Practice Guidelines for Children and Adolescents With Autism 9 (2009) (noting that individuals with autism represent "a large population of individuals who are in need of ongoing services[.]").

In addition to highlighting the importance of occupational therapy and other related services, Congress recognized that any delay in providing these services to children with disabilities is "extremely detrimental" because it can "result in a substantial setback in a child's development." 121 Cong. Rec. 37416 (1975) (Sen. Williams); *see also id.* (noting that a "delay in resolving matters regarding the [IEP] of a handicapped child is extremely detrimental to his [or her] development"). Indeed, "[s]ome skills must be learned early in the brain's maturation process for them to be learned well, or in some cases, at all. Delay in remedial teaching is therefore likely to be highly injurious to such children." *Town of Burlington v. Dept. of Educ. for*

the Commonwealth of Mass., 736 F.2d 773, 798 (1st Cir. 1984) (citation omitted).

Similarly, any gap in or cessation of the related services being provided can cause a child to regress. This is especially true for a child, like Jacob Winkelman, who has autism. *See J.H. v. Henrico County Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005) (citing, with approval, expert testimony that "reducing the frequency of related services represents a significant change and a threat to the progress that [a child] and his teachers have worked so hard to achieve") (autism case involving reduction of related services, including occupational therapy); *J.H. v. Henrico County Sch. Bd.*, 326 F.3d 560 (4th Cir. 2003) (noting expert testimony that child with autism has "a window of opportunity for when he can most effectively learn to overcome his deficits due to autism"). In short, the discontinuation or interruption -- even for a short period of time -- of occupational therapy services can be highly detrimental.

Indeed, the discontinuation of occupational therapy for a child with disabilities, such as Jacob Winkelman, should only be done when the student "either has met goals requiring occupational therapy collaboration and no additional ones are appropriate[,] . . . no longer [needs the services] . . . or . . . is unable to participate because of medical, social or psychological difficulties." *See* The American Occupational Therapy Association, Inc., Occupational Therapy Practice Guidelines for Children and Adolescents With Autism 30-31 (2009). In contrast, here, the School District gave the Winkelman Parents no assurance that it would continue occupational therapy into the 2003-04 school year,

and it claimed the right to make that decision – unilaterally – only after the school year began. Such an approach has the practical effect of threatening the educational well-being of children, like Jacob Winkelman, who need occupational therapy and who need to receive therapy without interruption or delay. Thus, the IEP proposed by the School District violated not only the letter of the IDEA, but also its spirit and purpose. As a result, Jacob was denied his right to receive an appropriate education.

It is, however, not only children with autism whose education is affected by the issue presented by the case at bar, nor is it only children who need to receive occupational therapy. To put the issue into perspective, the Court's resolution of this issue may affect the more than 6.7 million disabled children that qualify for federally supported services and, therefore, receive IEPs, under the IDEA and related programs. *See* U.S. Dep't of Educ., Office of Special Education Programs, Data Analysis System, https://www.ideadata.org/TABLES31ST/AR_1-1.htm (last visited Apr. 8, 2009). This figure represents approximately 14 percent of all students enrolled in public schools, pre-kindergarten through the twelfth grade. *See* National Center for Education Statistics (reporting for 2005-06 school year), http://nces.ed.gov/programs/digest/d07/tables/dt07_047.asp (last visited May 7, 2009). In short, the issue is an important one that merits the attention of this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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